IN THE MATTER OF the Human Rights Code, R.S.O., chapter H.19.

AND IN THE MATTER OF the amended complaint of Marjorie Elliott dated October 26, 1990, alleging discrimination in facilities on the basis of handicap by Epp Centres Inc. operating as Village Green Plaza, Peter Fast and Harry Epp.

BEFORE

Elizabeth Beckett	Chairperson

APPEARANCES

Naomi Overend	Counsel for the Ontario Human Rights Commission
Leslie Flemming	Counsel for Complainant, Marjorie Elliott
Paul Heath	Counsel for Harry Epp et al

HELD AT	448 Louth St., St. Catharines, Ont., February 3, 4, 5 and April 1 and 2, 1993

I was appointed by the Honourable Elaine Ziemba as a Board of Inquiry on August 28, 1992 to hear and decide this matter.

PRELIMINARY MATTERS

During the conference call of September 18, 1992 the Board indicated to all counsel that preliminary matters would be dealt with by way of written submissions and that the rulings on these matters would be made at the first day of the hearing. A schedule was set up for the exchange of legal arguments between counsel and it was adhered to. The rulings follow.

JURISDICTION

The respondent challenges the jurisdiction of the Board to hold this inquiry based on three arguments.

First he suggests that this matter could be dealt with under the Ontario Municipal Act and therefore under section 34(1)(a) of the Human Rights Code discretion should be exercised to allow the matter to be heard by another body. Section 34(1)(a) reads:

> "Where it appears to the Commission that, (a) the complaint is one that could or should be more appropriately be dealt with under an Act other than this Act, ... the Commission may, in its discretion, decide to not deal with the complaint."

Leaving aside the issue of whether this matter should or could be heard under another Act, the plain reading of this section gives the discretion to the Commission and not to the Board of Inquiry. It is possible that counsel may want to argue as part of his defence that his client was not under compulsion to set aside a designated area for handicapped parking because of the failure of the town of Niagara-on-the-Lake to act under the Municipal Act but it is clear that the argument does not deprive this Board of the jurisdiction to hold this inquiry when the Minister has acted to appoint this Board to do so.

Second under the same section of the Ontario Human Rights Code quoted above at subsection (d) a limitation period is established and it was argued that the present complaint falls outside that limitation period. The subsection reads:

> "Where it appears to the Commission that the facts upon which the complaint is based occurred more that six months before the complaint was filed, unless the Commission is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay, the Commission may in its discretion, decide to not deal with the complaint."

Leaving aside the issues of whether or not there was delay, and if there was, whether it was in good faith, and if there would be substantial prejudice in allowing a hearing, the Board points out that this is a matter to be dealt with by the Commission and not a Board of Inquiry.

The third argument was that it is the Planning Act that gives the municipalities the jurisdiction to pass by-laws regarding parking regulations both to set up and to enforce such provisions as the municipalities see fit to provide. Counsel argued that the requirement of "handicapped parking" spaces, because they are larger than regular spaces, may create conflict with existing by-laws. The regulations made under the Municipal Act shall not be deemed a breach of the zoning by-law and there is no such provision for a similar over-ride of power in the Human Rights Code.

Counsel appears to be saying that a municipality has the right to pass by-laws regarding parking under the jurisdiction given to it by the Planning Act. Having passed such by-laws that may also affect private businesses certain requirements may be established for a particular number of parking spaces. Under the Municipal Act a municipality may pass parking regulations specifically with regard to "handicapped parking". Because such spaces are larger than regular spaces this may have the overall affect of reducing the number of parking spaces; complying with the Municipal Act a merchant, for example, could find him/her self in non-compliance with the by-law passed under the Planning Act. This "catch 22" is dealt with in the Municipal Act by section 210, paragraph 153, that in effect says that if you have reduced the number of spaces required under the Planning Act by-laws to be in compliance with the Municipal Act by-law you

shall be deemed to be in compliance with both. Since there is no such section in the Human Rights Code counsel envisions a situation wherein a Board may order that a parking place be provided that would then place a person in trouble with another body of government.

In a highly bureaucratized society such as ours, there may be situations where is appears the left hand does not know what the right hand is doing; however this Board is not convinced that this is the case here. In the first place, until it is established that the requirement of such a space, should it be ordered, would in fact place the respondent in such a position, the argument is moot. Respondent counsel did not argue that such a requirement would have that affect, merely that it may. Secondly, it should be remembered that the Human Rights Code is remedial legislation, and therefore it is envisioned that orders made under the Code will have the effect of changing the existing order. If the society did not need to be so changed there would be no need for the Code. If the Code does not have the authority to institute the changes it envisions then there would be little point in the Code being passed by government. This remedial aspect is underlined by section 47(2) which reads:

> "Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply notwithstanding this Act."

This section has the potential to mean that if a Board orders that a "handicapped parking" space is required by a business in order to be in compliance with the Ontario Human Rights Code, such an order would over-ride a municipal by-law that has the effect of requiring the business to provide parking spaces that do not allow access to the business by persons requiring the use of mechanical assistance for mobility purposes.

Therefore, this Board rules that there is jurisdiction to hear this matter.

DELAY

Counsel for the respondent moved that the complaints be dismissed because of the delay in bringing these matter forward to a hearing.

He made argument under two heads: the Charter of Rights and Freedoms and delay as an abuse of process. Each will be dealt with.

Charter Argument Section 11

It is now well established that section 11 of the Charter of Rights and Freedoms applies only to persons charged with a criminal offence. The nature of the Human Rights Inquiry is civil. The Board's decisions are based on findings made on the civil standard of "balance of probabilities". The Board has no jurisdiction to punish. There is no finding of guilt; indeed there is no requirement that intent be made out to find that there was discrimination under the Code. The Board, like a civil court, may order damages. The Board may also order other remedial action. None of the powers of the Board allow persons coming before it the protection afforded by section 11 of the Charter of Rights and Freedoms.

Charter Argument Section 7

This section protects people in our society from being deprived of life, liberty and security of person except in accordance with natural justice. It has been used to argue successfully that undue delay in a trial process is contrary to the protection afforded by this section.

Three Boards of Inquiry have recently determined that section 7 of the Charter does not apply to the remedial proceedings under the Human Rights Code.

Hall v. A-1 Collision and Latif (unreported, August 28, 1992, Dawson)
Persad v. Sudbury Regional Police Department (unreported, July 31, 1992, Friedland)
Munsch v. York Condominium Corporation No. 60 (unreported, July 2, 1993, Cumming and Omatsu)

In the Hall decision, Professor Dawson specifically looks at the Kordellas decision on which counsel for the respondent heavily relies. She says:

> "In their emphasis on the type of accusation and their de-emphasis on the penal context in a proceeding or consequence, the judges in Kordellas departed from the more established understanding that section 7 rights arise in light of either the possible consequences of a proceeding to an individual, or the nature of the proceedings. Kordellas appears to craft a third route to section 7 of the Charter which focuses on the subject matter of the allegations and whether the kind of misconduct in question is such that an allegation would cause a normally sensitive person accused of it to suffer from the kind of distress the court of Appeal described such that, if the process is unreasonably prolonged, section 7 is infringed."

Mr. Kordellas was being brought before a Board of Inquiry because of allegations of sexual harassment. In this case the complaint is lack of access due to the failure to provide handicapped parking. It is clear to this Board that although both allegations, if proven, are a breach of the Code allegations of sexual harassment carry a degree of stigmatization in the community. This Board would be hard pressed to be convinced that such would be the case with regard to a parking issue. The nature of the allegation being raised here is not sufficient to bring the respondent within the life, liberty or security interests protected by the Charter.

ABUSE OF PROCESS

The final protest made by respondent counsel is that this matter should not proceed due to delay because to do so would be an abuse of the process of the Board. Three cases were cited in this regard: Douglas and Jonlee Holdings Ltd. v. Saskatchewan Human Rights Commission; Marcotte v. Hymes, (1990) 1 W.W.R. p.455 and Harvey v. The Law Society of Newfoundland (unreported). In addition reference was made to the Korellas case. In all of these cases facts were in dispute and the delay had the potential of making a fair hearing impossible because of the failure of witnesses to remember events or even to be found. This is not the situation in the case before this Board. The facts in this case have never been in dispute. They are very straightforward in nature and easily proven. Counsel does not argue that he will have any difficulty in presenting his case because of the delay; he merely argues that there has been a

delay and it is not his client's fault and therefore the matter should be dismissed. This is not sufficient to establish "abuse of process".

The Statutory Powers and Procedures Act gives this Board the jurisdiction to dismiss because of delay. In Gohm v. Domtar Inc. 10 C.H.R.R., 1989 and several other cases following it, Boards of Inquiry cite with approval Hyman v. Southam Murray Printing Ltd:

> "... while unreasonable delay might be a factor to be taken into account in refusing or fashioning a remedy ... or in weighing the persuasive force or credibility of testimony or evidence, delay in initiating or processing a complaint should not be considered a basis for dismissing the complaint at the outset of the proceedings before the board of inquiry unless it has given rise to the situation in which the board of inquiry is of the view that the facts relating to the incident in question cannot be established with sufficient certainty to constitute the basis of a determination that a contravention of the Code has occurred. Having been assigned, by order of the Minister..., a statutorily defined task of undertaking an inquiry ... the board should proceed to attempt to do so, notwithstanding the passage of considerable time, unless the passage of time has made fulfilment of its task impossible."

In this case, although there has been considerable passage of time, it has not made the task impossible to fulfil. The facts are not in dispute nor is there any suggestion that required witnesses are unavailable or that passage of time has hindered their ability to give adequate testimony to allow the Board to make its findings.

Therefore, the hearing will go forward.

The above arguments were made by Mr. Richardson who is not the respondent's present solicitor. Mr. Heath agreed to be bound by the decision of the Board without making any new submission.

I would like to thank Mr. Heath, Ms. Overend and Ms. Flemming for their thorough presentation of both the facts and the arguments in this case. It is the first case dealing with the

issue of access to accommodation for the disabled in Ontario and the assistance of counsel was very much appreciated.

FACTS

On June 26, 1988 the complainant, after attending church, endeavoured to go out to lunch with a friend. For no particular reason they chose to go to a restaurant located in the Village Green Plaza in the hamlet of Virgil within the municipal region of Niagara-on-the-Lake. The complainant uses a motorized wheelchair and drives a van equipped with a lift device. The combination of these two pieces of technology give her a fairly high degree of independence and mobility despite her severe handicap. On the other hand, these two pieces of technology require that she have a wider than usual parking space.

When she pulled into the plaza on the day mentioned she looked for such a parking place. It could have been either a space that was larger because of the geography of the parking area or a designated space for "handicapped parking". Not finding the latter she looked for the former. There were no double spaces available that she could see. There was however a large entrance way that already had a car parked in it and she felt it would meet her needs and cause no harm to anyone else if she parked there and so she did. Before she had a chance to leave the van a man appeared at the window of the van and ordered her to leave. The testimony of the complainant was that this man identified himself as Peter Fast; he told the complainant that he was the owner of the plaza and he told her "I don't want you to park here." The complainant pointed out that she was disabled and had stickers designating her vehicle as a special vehicle and that she could not park anywhere else as the spaces would not accommodate her. Mr. Fast simply replied, "I don't care, I don't want you here". According to the complainant the encounter took on a decidedly unpleasant tone and she felt very upset by the way she was treated.

Mr. Fast was never called as a witness but Mr. Epp indicated in his testimony that Mr. Fast had "zero interpersonal skills." Later testimony revealed that the reason the complainant could not park in the entrance way was because it was a fire route. There was no indication of this at the site nor was the complainant told this by Mr. Fast. It was further established that there was more parking in another area of the plaza and the complainant may have found suitable parking there. Again she was not told about this area by Mr. Fast. It was the testimony of the complainant that at no time did Mr. Fast offer to assist her in any way either in offering alternative parking or by offering other assistance that may have allowed the complainant to go into the restaurant in the plaza. Eventually she left the plaza. She and her friend had lunch elsewhere, although they were so upset by the encounter and the way they had been treated that neither of them took much pleasure in the outing.

The next day the complainant lodged a complaint with the Human Rights Commission. She alleges that she was discriminated against contrary to Section 1 of the Ontario Human Rights Code and that no accommodation was made for her as required by Section 11 and or Section 17 of the Code.

The complainant has made persistent attempts to get this matter resolved or failing that put before a board of inquiry. She complained to the Ontario Ombudsman's office. She contacted private counsel and made several attempts at her own investigation to assist the process. Despite all of this it took nearly four years to hold this inquiry. The friend who was with Ms. Eiliott on the day of the outing has since died.

The Commission called as an expert witness Ms. Catherine Frazee who was a Human Rights Commissioner from 1985 - 1989 and the Chief Commissioner from 1989 - 1992. This witness was impressive not only in her personal capacity as a profoundly disabled person who has succeed in this barriered society but also as a professional with expert knowledge of the access needs of the disabled community. The tenor of her evidence was the change in the attitudes

required not merely to make the community minimally available to disabled people but also to create an environment where disabled people can be fully integrated with dignity into the life of the Canadian society. The change in the paradigm from the medical to the consumer model has led to demands that disabled people be seen as users of services to be accommodated rather than as patients to be treated.

Ms. Frazee described the "Guidelines for Assessing Accommodation Requirements for Persons with Disabilities". These were developed by the Human Rights Commission to become regulations to accompany the changes to the Code made in 1988. The 1988 amendments required accommodation be made to allow disabled persons to take full advantage of the Ontario workplace and wider community. To date these Guidelines have not been adopted as regulations.

Mr. Epp personally had no part in the encounter between Ms. Elliott and Mr. Fast, but as sole shareholder of the corporation that owns the plaza he has knowledge of facts of concern to this inquiry. The respondent acknowledged in his testimony that there is no designated parking for disabled persons at the Village Green Plaza.

There was testimony from Mr. Epp about the parking issues at Village Green Plaza and the Board will attempt to summarize them. Mr. Epp through a corporation purchased the Village Green Plaza in 1980; it was built some time in the early '70's. Around 1986 he applied to the town of Niagara-on-the-Lake for a permit to renovate some of the space at the plaza. At this time it was discovered by an official in the town office that there was a problem with Village Green Plaza.

According to the approved site plan this property was designated as a commercial mall. The actual use was more consistent with a shopping centre. These are technical definitions with ramifications to specific requirements of the planning authorities. There was no suggestion that

the use was changed since the approval of the site plan, but rather that the original zoning was incorrect. Shopping centres are not permitted at the location of Village Green Plaza. The parking regulations as imposed by the Planning office vary according to the way a property is zoned. Mr. Epp was in compliance with the shopping centre requirements but not commercial mall zoning. It was proposed that he put in an application either to have his property re-zoned or to be deemed to be in compliance. He applied to have his property re-zoned as a shopping centre. He also wanted to add some six spaces to his lot and this too would require a change to the site plan on file with the city. The revised site plan was submitted. Due to overload at the city this plan was not dealt with in a timely fashion and eventually Mr. Epp went ahead and made the changes without approval This let to meetings and to the expression of disapproval by the planning officials. Currently, Mr. Epp has some eighty one parking spaces. To be in compliance with the type of zoning for which he expects to be approved, seventy-four spaces are needed. The number of spaces required for the zoning he actually is, on paper, zoned for is ninety-seven. (see exhibit 17)

The report prepared by Mr. Walker, the Director of Planning and Development Services for Niagara-on-the-Lake, for submission to the town recommends that approval be given for a change in the zoning of the property to reflect its actual use and also recommends approval of the addition of six parking spaces.

Mr. Epp testified that one of the reasons he did not put in a "handicapped parking" space when requested to do so by the Commission was that he had already had a lot of trouble with the city and did not want to invite more. This is in conflict with the fact that in 1988 he put in some six spaces without waiting for approval and again in 1990 without approval he widened an existing space to 13 feet and put in two ramps from the parking area to the sidewalk. One such ramp adjoined the widened space. Although these spaces do not necessarily comply with the Canadian Standards Association of Barrier Free Design they were perhaps an attempt to deal

with the problem of access for persons with disabilities. Mr. Epp did not say that this was his intent however.

Mr. Epp further testified that there was no by-law requiring that he, a private land owner, provide "handicapped parking". He indicated that in the absence of a by-law he was not certain that he would put in a designated space.

Mr. House, the town clerk for Niagara-on-the-Lake, testified that indeed there was no by-law requiring "handicapped parking". He said that such a by-law had been thought of but was not under active planning at this time. There were many considerations not the least of which was an enforcement mechanism that would require financial commitment from the city.

The testimony from the town officials indicated that when a site plan was submitted by a private individual to build or renovate a commercial structure it was the practice of the city to encourage the provision for "handicapped parking". This generally is met without resistance. Despite the lack of official enforcement the city has had no complaints about problems when spaces are so designated.

FINDINGS OF THE BOARD

Discrimination in the Provision of Services

It is the finding of this Board that Epp Centres Inc. does not have "handicapped parking" at its Village Green Plaza and therefore is in contravention of the Human Rights Code. It was agreed by the parties that parking is a service. By not providing parking for disabled patrons this corporation has created a situation whereby persons with disabilities are adversely affected, in a way that the able-bodied are not, when attempting to make use of the services offered in the plaza. It is by now trite law that intention to discriminate is not an issue; nor is it required that discrimination needs to be direct. It is discrimination if a situation results that excludes disabled

persons from taking full advantage of services provided to the rest of the community. This was recently underlined by the Supreme Court of Canada decision Central Okanagan School District No. 23 v. Renaud [1992] unreported (S.C.C.). Judge Sopinka states; "Adverse effect discrimination is prohibited by the Human Rights Act no less than direct discrimination." He was dealing with the British Columbia statute but the same reasoning applies in Ontario. The argument that one is not being discriminated against if one is being treated the same as everyone else is fallacious and has been rejected by Canadian courts. In Andrews v. Law Society of British Columbia S.C. of C. [1989] 1 SCR the court says:

> " ... every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality. ... There is no greater inequality than the identical treatment of unequals." p. 164

Accommodation of Persons with Disabilities

Once the Commission makes out a prima facie case of discrimination, as it has done here, the respondent under section 11(2) or 17(2) may claim that accommodation of the disabled person is not possible. The section creates the defence of "undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and the health and safety requirements, if any."

The leading case in the area of accommodation is the decision of the Saskatchewan Court of Appeal in Huck v. Canadian Odeon Theatres Limited 6 CHRR (1985). In that decision the court said:

> "the interpretation of a statute which guarantees fundamental rights and freedoms and which prohibits discrimination to ensure the obtainment of human dignity should be given the widest interpretation possible. ... A narrow restrictive interpretation which would defeat the purpose of the legislation, that is, the elimination of discrimination should be avoided." p. 108

The respondents sought to put themselves under the umbrella of the protection created by the section quoted above that limits the duty to accommodate. They argued that no requirement for parking should be made in this case essentially for one reason: there was no by-law requiring it. This argument was developed in several different approaches. First, it was argued that the Human Rights Code should not be read to give the Board power to order something that would put the respondent outside an existing law (i.e. requiring such parking would be counter to the existing site plan and therefore requiring parking for the disabled would require that the respondent act against the present requirements of the municipality). Second, the respondent took the position that without a by-law there would be no enforcement of parking provisions on which the respondent could rely. Third, in the absence of a by-law to require parking, it was argued that an order would have the effect of acting retroactively to change situations that were in compliance with the law when they were done. That is, when the site was approved the parking specifications were, although wrongly, thought to be correct and an order cannot appropriately now make the parking not law abiding.

Fourth, it was argued that in the absence of a by-law, the order of this Board would inappropriately require the respondent to do something "positive" to adhere to the Code. It was argued the Code only has the right to prevent discrimination that arises from negative behaviour. That is, the Code sets up requirements that persons may not act against and does not set up a regime that requires people to take steps to prevent discrimination.

Fifth, the respondent argued that if a duty to act in a positive way to prevent discrimination is to be imposed it must be reasonable and it is not reasonable to order this corporation to act in a way that would cause them to be in non-compliance with their site plan.

It is important to note that at no time did the respondent argue that to make such an order would cause undue hardship in terms of the limitations spelled out by the Code itself, those being cost,

or health and safety requirements. Rather it was argued that orders must be reasonable and reasonableness should take into account those concerns argued above.

Taking the respondent's argument at its strongest, that the Board should consider factors other than just cost and health and safety issues let us examine the objections to making an order.

FIRST: *Absence of By-law Leading to Non Compliance with Site Plan.*

Section 47(1) and (2) gives the Human Rights Code paramountcy over other existing legislation unless specifically excluded by that law. The paramountcy of human rights legislation was commented on by the Supreme Court of Canada in Re: Winnipeg School Division No. 1 and Craton [1985] 21 D.L.R. (4th) (S.C.C.) 1 at page 3. "Furthermore, human rights legislation is public and fundamental law of general application and prevails where there is a conflict with other specific legislation unless an expectation is created."

Moreover, on the facts of this case, although an order to install parking for the handicapped would initially cause the respondent to be in non-compliance with his site plan, this could easily be overcome by the respondent filing an amended plan. There was no argument that the filing of such a plan would cause the respondent undue costs. There was evidence from the officials of the Niagara-on-the-Lake Planning Department that such requests are encouraged and generally are met with approval. In this case it cannot even be argued that if such a requirement was demanded by the Board it would cause the respondent to have fewer spaces than required for his present use. It would mean he would have fewer spaces than his present zoning, but that is the case now in any event. He has applied to have his zoning changed to be consistent with his use and evidence suggests that this will be approved. When that approval is granted he will have more spaces than required by the town and a reduction will not be an issue.

SECOND: *Lack of Enforcement.*

It was argued that the Board should not make an order that cannot be enforced and since in the absence of a by-law the town will not enforce parking limitations no order should be made. The respondent, as a private landowner, has certain rights to enforce rules he makes about the use of his property. He can require that only patrons of the plaza use the parking area; he can require no overnight parking; he can put a limit to how long any particular car can remain on the property. One sees such restrictions every day. Presently, as this case has demonstrated, the respondent does not allow parking in the entrance way of his plaza. There is no sign forbidding it but if any one parks there they are asked to leave. This rule is not enforced by the town; it is enforced by the owner. One sees many instances in the community where there is an indication by private land owners by signs and pavement markings that certain spaces of a parking lot are designated for the use of handicapped patrons only. The officials of Niagara-on-the-Lake testified that this is how private land owners presently handle "handicapped parking" and there have been no complaints. An order to provide spaces does not require vigilant and expensive enforcement. It simply says: provide the spaces; take whatever reasonable steps are needed to enforce the provisions and then trust to the good will of the public just as one does when indicating parking restrictions in fire routes, entrance driveways, loading areas or privileged parking for certain tenants.

THIRD: *Retroactivity.*

There is an understanding that the law should not be applied retroactively but that of course does not prevent the law from changing existing rights of citizens. The Huck decision dealt with this because in that decision the owner of the theatre was ordered to make changes to his building even though the building was approved by building standards when it was built. The judge made a distinction between retrospective law that "opens up a transaction and changes the consequences of a transaction although only in the future" and a statute that affects exiting rights. "Existing rights can be affected by statute without the operation of the statute being retrospective." At page D/2692 the court says:

> "The court must interpret the statute in accordance with the principles of statutory interpretation to determine what it means. If the meaning is clear, then it must be applied in that sense. The provisions of the Code when read in their entire context and their grammatical and ordinary sense, having regard to the objects of the Code, that is the preservation of human dignity, must be taken to apply to all existing services and facilities, not just to facilities which came into existence after the Act was enacted. To conclude otherwise, would defeat its purpose and object. Read as whole ... the section is not ambiguous. The presumption (of retroactivity) does not apply."

The presumption against retroactivity should only be applied when there is ambiguity. If there is no ambiguity, the statute should be taken to change the existing rights of the citizens.

Is there any ambiguity in the Ontario statute? When the Code was first passed in 1981 there was a prohibition against discriminating against disabled persons but then Section 16 said it would not be considered discrimination if the reason for the discrimination was "that the person does not have access to premises, ... or that the premises ... lack amenities that are appropriate for the person because of the handicap;". The section provided that the Commission could use its "best endeavours to effect settlement as to the provision of access or amenities." In 1986 the present section was passed by the legislature and was proclaimed as law in April of 1988 (two and a half months before the occurrence that is before this Board). The present section took away the "best endeavours" approach and replaced it with the duty to accommodate unless to accommodate would cause undue hardship. It further enumerated what to consider when assessing hardship. This can hardly be seen as ambiguous. Rather it demonstrates clear legislative intent. The intent is to impose on the general public a duty to make life in the community accessible for all people in Ontario.

FOURTH AND FIFTH: *Positive versus Negative Duty; Reasonableness.*

It was argued with some force by respondent counsel that the Code cannot be interpreted to create a duty to do something; it can only be used to prohibit future actions of the sort that cause discrimination. Such an interpretation of the Code is narrow and would prevent orders which address cases of constructive and systemic discrimination. The duty to accommodate as spelled

out by sections 11 and 17 of the Code envisions wider application. In Re Ontario Human Rights Commission et al. and Simpson-Sears Ltd. 23 D.L.R. (4th) [referred to as the O'Malley case] the Supreme Court of Canada says: "it will remain for the employer to show undue hardship if required to take more steps for its accommodation than he has done." It elaborates: "While no right can be regarded as absolute, a natural corollary to the recognition of a right must be the social acceptance of a general duty to respect and to act with reason to protect it" (emphasis mine). The duty to accommodate is also considered by the S.C.C. in the case of Central Okonagan School District v. Renaud 16 C.H.R.R. D/425. The Renaud case clearly rejects the "de minimus standard" used in American jurisprudence as it is the opinion of the Supreme Court that such a standard virtually removes the duty to accommodate.

> "More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term 'undue' infers that some hardship is acceptable; it is only 'undue' hardship that satisfies this test. The extent to which the discriminator must go to accommodate is limited by the words 'reasonable' and 'short of undue hardship'. These are not independent criteria but are alternate ways of expressing the same concept."

The Supreme Court of Newfoundland has also considered the positive duty to accommodate persons with disabilities in considering the Building Accessibility Act of Newfoundland. The Supreme Court of Newfoundland stated:

> "It is the policy in Canada to integrate the disabled into the life of the community in every way possible. The elimination of physical barriers to such integration, is at the very heart of the Act and regulations." Atlantic Shopping Centres v. Newfoundland (1988) 9 C.H.R.R. D/4836 at 4339.

The intent of the Newfoundland legislation and the relevant provisions of the Human Rights Code of Ontario are the same; that is, to remove barriers to disabled persons enjoying life in the community.

The requirement of accommodation must be seen not only in the light of the person being required to change their behaviour, but also from the point of view of those who seek to benefit from the accommodation. Although the accommodation proposed in this case does require that Epp Centres Inc. do something that was not required by the Planning Department of the city of Niagara-on-the-Lake it is an accommodation that is neither onerous nor unreasonable. Moreover, it will not cause the corporation undue hardship in terms of costs; it will not present any health or safety concerns for the rest of the public using the mall; and it will create a safer environment for disabled persons wishing to park at the plaza.

LIABILITY OF EPP CENTRES INC. FOR THE ACTIONS OF PETER FAST

Although this complaint originally named Peter Fast as a party he was not proceeded against by the Commission. At the hearing, an attempt was made to sweep him in by proving that he was either an employee of the corporation or an agent of the corporation. It is the finding of this Board that Peter Fast was an independent contractor who carried out specific duties for the corporation. His encounter with Ms. Elliott was not within the scope of those duties. There is no finding of liability on the corporation arising from his rude treatment of the complainant.

LIABILITY OF HARRY EPP PERSONALLY

It is the finding of this Board that Harry Epp personally is not liable for the contravention of the Code as alleged by the complainant. All of his actions in this matter have been as an officer of the corporation Epp Centres Inc.

ORDER OF THE BOARD

1. That Epp Centres Inc. forthwith provide one designated "handicapped parking" space at the Village Green Plaza. The space shall be at least 4600 mm wide, unless it is for parallel parking in which case it should be at least 2600 mm wide x 7400 mm long. The space shall have a height clearance of at least 2750 mm at the parking space and along the vehicle access and egress routes.
2. That Epp Centres Inc. shall designate the space as reserved for use by physically disabled persons by use of the Uniform Traffic Control Sign, mounted vertically and the international symbol of access on the pavement of the stall. The vertical sign shall be at least 300 x 600 mm; and installed at a height of at least 1500 mm from the ground to the centre of the sign. the symbol of access on the pavement shall be at least 1000 mm long; located in the centre of the stall and in a colour strongly contrasting with the

background pavement. The Uniform Traffic Control Sign Identifying Parking Spaces for the Disabled is a sign at least 600 mm x 300 mm showing a blue border, white background, green circle enclosing a green depiction of a person in a wheelchair and above this picture a blue letter P surrounded by a red circle with a red slash going through the P.

The sign should indicate that parking in this area is by permit only.

3. A ramp shall be constructed leading from the designated stall for use by a person in a wheelchair to gain access to the sidewalk areas surrounding the plaza.

4. That Epp Centres Inc. shall pay the sum of $1,000 to Marjorie Elliott to compensate her for the infringement of her right to be free from discrimination.

So ordered by Elizabeth Beckett, Chair, this 22 day of June, 1993.

Elizabeth Beckett